82-1101

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SENTINEL FINANCIAL INSTRUMENTS
and MICHAEL M. SENFT,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Under this Court's decision in *Bellis* v. *United States*, 417 U.S. 85 (1974), does a person who would be protected by the Fifth Amendment from compulsory production of documents of his sole proprietorship business, lose that protection because he has chosen to make the business in form a limited partnership for the sole purpose of giving his minor child and younger brother gifts of 1% of the business' profits?

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Petitioners Sentinel Financial Instruments ("SFI") and Michael M. Senft respectfully request that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered on December 15, 1982, affirming the order of the United States District Court for the Southern District of New York denying petitioners' motion to quash a grand jury subpoena addressed to petitioners' law firm and seeking SFI documents.

Opinions Below

The summary order of the Court of Appeals for the Second Circuit is unreported and appears in Appendix A hereto. The opinion of the District Court for the Southern District of New York is also unreported and appears in Appendix B hereto.

Jurisdiction

The summary order of the Court of Appeals for the Second Circuit was filed on December 15, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 17(c) of the Federal Rules of Criminal Procedure provides:

> (c) *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, docu-

ments or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Statement of the Case

Petitioner SFI is a New York limited partnership that acts primarily as a broker and dealer in government securities. SFI's only general partner is petitioner Michael M. Senft, who upon SFI's formation in July 1979 made an initial contribution to SFI's capital of $49,500 and who owns a 98% interest in its profits and losses.

SFI has two limited partners. One limited partner is the Jennifer E. Senft Trust (the "Trust"), a trust established by Mr. Senft for his minor child. The Trust's only trustee is Burton G. Lipsky, Esq., an attorney who is also Mr. Senft's personal attorney. Mr. Senft gave the Trust a gift of $500, which the Trust used in July 1979 to make its only capital contribution to SFI ($500 being approximately 1% of SFI's then estimated net worth). The Trust is entitled to 1% of SFI's profits (and is not liable for any of SFI's losses beyond the amount of the Trust's $500 capital contribution). The Trust's only other assets are an interest in a term life insurance policy on Mr. Senft's life and investments it has made from the proceeds of its 1% income interest in SFI.

The other limited partner is Michael Senft's younger brother, David. David Senft's only capital contribution to SFI, made in June 1980, was $10,000 (approximately 1% of SFI's then estimated net worth); the money for this capital contribution

was loaned (interest free) to David by his brother Michael. David Senft has never repaid this loan, and no demand has ever been made for repayment. David Senft's limited partnership interest in SFI entitles him to 1% of SFI's profits (and he is not liable for any of SFI's losses beyond the amount of his capital contribution).

These 1% interests are the only interests of the Trust and David Senft in SFI. As limited partners, they have no authority concerning how SFI is operated. Michael Senft has sole managerial control over SFI, and he alone is responsible for all its policy decisions. The small limited partnership interests held by the Trust and by David Senft are nothing more than gifts of a small portion of SFI's profits bestowed by Michael Senft on his daughter and his brother.

In July 1982, the government served on SFI and on Wachtell, Lipton, Rosen & Katz ("Wachtell, Lipton"), attorneys for Mr. Senft and SFI, grand jury subpoenas calling for production of certain SFI documents.[1] The government had earlier informed Wachtell, Lipton that Mr. Senft and SFI are targets of the grand jury's investigation.

Prior to the issuance of the subpoena in question here, the SFI documents called for by that subpoena had been in the possession of an SFI employee who had allegedly been instructed by another SFI employee, acting without Mr. Senft's knowledge, to destroy them but had failed to do so. While continuing to be employed by SFI, the employee maintained possession of the documents, again without the knowledge of Mr. Senft or anyone else at SFI. When the SFI employee's possession of the documents was made known to Mr. Senft,

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1 The subpoena addressed to Wachtell, Lipton asks for production of "[a]ny and all Sentinel Financial Instruments documents pertaining to transactions between Sentinel Financial Instruments and Jesco & Associates for 1980." The subpoena addressed to SFI asks for production of "[a]ll Sentinel Financial Instruments (1) Customer trading sheets; (2) Records known internally as 'green sheets.' "

attorneys acting on Mr. Senft's behalf requested the employee to return the documents to Mr. Senft's attorneys for the sole purpose of their rendering legal advice to Mr. Senft. The SFI employee accordingly returned the documents to the attorneys, who were Mr. Senft's representatives, months before the subpoena at issue here was served.

A. Proceedings in the District Court

On August 6, 1982, Mr. Senft and SFI moved in the District Court to quash the grand jury subpoenas, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, on the ground that requiring production of the documents called for would violate Mr. Senft's Fifth Amendment privilege against compulsory self-incrimination. Petitioners and the government both submitted affidavits and briefs to the District Court in support of their respective positions.

On October 18, 1982, the District Court denied the motion to quash, holding that SFI "has an established institutional identity separate from its individual partners" and therefore should be treated for Fifth Amendment purposes like a corporation (which has no Fifth Amendment privilege), rather than like a sole proprietorship (which does). The District Court "relied on a factual examination of organizational activity, rather than focusing on the extent and nature of the ownership group"—as had been urged below by the petitioners—"to determine if the records of a small family partnership may be protected by the Fifth Amendment privilege." The District Court ruled that SFI documents are not privileged while in Mr. Senft's possession and, therefore, they are not privileged in the hands of Mr. Senft's attorneys. Accordingly, the District Court refused to quash the subpoena addressed to Wachtell, Lipton.

B. Proceedings in the Court of Appeals

On October 29, 1982, petitioners filed a notice of appeal from that portion of the District Court's order refusing to

quash the grand jury subpoena addressed to Wachtell, Lipton.[2] Thereafter, the government requested expedited treatment of the appeal, which petitioners did not oppose and which the Court of Appeals granted. After full briefing by the parties, but without hearing oral argument, the Court of Appeals filed a summary order on December 15, 1982, affirming the decision of the District Court. In its summary order, the Court of Appeals stated that SFI "clearly had an institutional identity separate and distinct from Michael Senft." Without addressing the District Court's failure to make an inquiry as to whether the subpoenaed documents were held by Mr. Senft in a representative capacity—as clearly required by this Court's decision in *Bellis* v. *United States*, 417 U.S. 85 (1974)—the Court of Appeals conclusorily stated that Mr. Senft "controlled the records in his representative capacity as a general partner of [SFI]. He had no personal right to possession or control of the documents." The Court of Appeals concluded that Mr. Senft could not assert his Fifth Amendment privilege against self-incrimination to bar production of the subpoenaed documents.

On December 17, the government moved in the Court of Appeals for issuance of the mandate forthwith. Petitioners cross-moved for a stay of the mandate pending their application for a writ of certiorari. On December 28, 1982 the Court of Appeals denied both motions.

* * *

As the foregoing facts reveal, SFI is a business that in virtually every respect is operated as a sole proprietorship of its principal, petitioner Michael M. Senft. Because, however, of

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2 Petitioners' decision to pursue an appeal only from the refusal to quash the subpoena addressed to Wachtell, Lipton was made in light of the settled law of the Second Circuit that the target of a grand jury investigation does not have a right of appeal from the denial of a motion to quash a subpoena directed to the target, *see In re Grand Jury Subpoena for New York State Income Tax Records*, 607 F.2d 566, 569 (2d Cir. 1979), but does have such a right with respect to the denial of a motion to quash a subpoena addressed to a third party, *id.* at 570.

Mr. Senft's desire to bestow gifts on two members of his immediate family—his minor child and his younger brother—SFI is in form a limited partnership. This form has no effect on the substance of SFI's business or the manner in which it is operated, and confers no business or other monetary benefit on Mr. Senft; its only effect is to allow Mr. Senft's brother and a trust for Mr. Senft's child each to receive gifts of 1% of SFI's profits. If SFI were in form a sole proprietorship, as it is in substance, there would be no question that Mr. Senft would have the right to assert his Fifth Amendment privilege for SFI documents. The issue presented by this petition is whether the District Court and Court of Appeals misapplied this Court's holding in *Bellis* v. *United States*, 417 U.S. 85 (1974), by unduly emphasizing the separate institutional identity of SFI and failing to make a detailed factual inquiry as to whether Mr. Senft held the subpoenaed documents in a representative capacity.

Reasons for Granting the Writ

The courts below failed to follow the analysis required by this Court in *Bellis* v. *United States* in determining that Mr. Senft could not assert his Fifth Amendment privilege with respect to the subpoenaed documents.

This Court has repeatedly recognized the appropriateness of exercising its certiorari jurisdiction in cases where the lower federal courts have misapplied or misconstrued decisions of this Court that are deemed to be "controlling" with regard to the petitioner's case. *See, e.g., New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 570-71 (1979); *Wilson* v. *Schnettler*, 365 U.S. 381, 383 (1961). In the case at bar, petitioners submit, both the District Court and Court of Appeals misapplied this Court's decision in *Bellis* v. *United States*, 417 U.S. 85 (1974), which, as both petitioners and respondent argued below, controls the disposition of this case. Moreover, this case raises the important question of when, if ever, the Fifth Amendment privilege may protect partnership documents. Accordingly, this

is a compelling case for the exercise of this Court's certiorari jurisdiction.

In *Fisher* v. *United States*, 425 U.S. 391 (1976), this Court held that an attorney who has possession of his client's documents for the purposes of rendering legal advice is not required to produce those documents pursuant to a subpoena if " 'the client himself would be privileged from production of the document, either as a party at common law . . . or as exempt from self-incrimination.' " *Id.* at 404-05 (quoting 8 J. Wigmore, *Evidence* § 2307, at 592 (McNaughton ed. 1961)). Accordingly, since the documents called for by the grand jury subpoena addressed to Wachtell, Lipton were transferred to Mr. Senft's attorneys for the purpose of obtaining legal advice, the government's ability to compel production of these documents—which are all records of SFI—turns on whether they were privileged from production while in Mr. Senft's possession. *See In re Katz*, 623 F.2d 122, 126 (2d Cir. 1980).[3]

The decisions of this Court and the lower federal courts recognize a bright-line rule distinguishing corporate records from records of a sole proprietorship as far as the applicability of the Fifth Amendment privilege is concerned: the privilege may not be invoked as to corporate records, but may be

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3 The government contended below that, because the subpoenaed documents had been delivered to Mr. Senft's attorneys directly by an SFI employee, they had been "abandoned" by SFI and therefore no privilege could be asserted with respect to them. Because the District Court held that Mr. Senft could not claim the Fifth Amendment privilege as to SFI documents, neither it nor the Court of Appeals addressed the government's contention. In view of the uncontradicted facts concerning how the documents were obtained by Mr. Senft's attorneys, the contention that the documents were abandoned and that the privilege has been vitiated by the purported abandonment is without merit. *See United States* v. *Beattie*, 541 F.2d 329, 331 (2d Cir. 1976) ("We do not read *Fisher*. . . . as detracting from the principle that the Fifth Amendment protects against compulsory production of a paper written by an accused with respect to his own affairs . . . and now in his possession, even though he may have previously sent it to another with the expectation that the latter would retain it.").

asserted successfully to resist compliance with a subpoena calling for records of a sole proprietorship business. *Compare Grant* v. *United States*, 227 U.S. 74, 79-80 (1913) *and Hair Industry, Ltd.* v. *United States*, 340 F.2d 510, 511 (2d Cir.), *cert. denied*, 381 U.S. 950 (1965) *with Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974) *and In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 330 (3d Cir. 1982).

Such a clear-cut rule does not, however, exist for records of a partnership. In *Bellis* v. *United States*, 417 U.S. 85 (1974), where this Court squarely addressed the issue of the applicability of the Fifth Amendment privilege to partnerships, the Court expressly declined to announce a per se rule against application of the privilege to records of all partnerships. Rather, the Court focused primarily on two factors it believed significant under the circumstances of that case: first, that the partnership there had "an established institutional identity independent of its individual partners," *id.* at 95, and, "[e]qually important, . . . [that] it [was] fair to say that petitioner [was] holding the subpoenaed partnership records in a representative capacity." *Id.* at 97. In applying those factors to the circumstances of the case before it, the Court took particular note of certain specific facts:

> It should be noted also that petitioner was content to leave these records with the other members of the partnership at their principal place of business for more than three years after he left the firm. Moreover, the Government contends that the other partners in the firm had agreed to turn the records over to the grand jury before discovering that petitioner had removed them from their offices, and that they made an unavailing demand upon petitioner to return the records. . . . [T]his provides additional support for our conclusion that it is the organizational character of the records and the representative aspect of petitioner's present possession of them which predominates over his belatedly discovered personal interest in them.
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> —*Id.* at 99-100.

Thus, while the Court considered the "established institutional identity" of the partnership to be a relevant factor, it was "in the circumstances of this case, petitioner's possession of the partnership's financial records in what can be fairly said to be a representative capacity [that] compel[led] [the Court's] holding" that the privilege was inapplicable. *Id.* at 101. Significantly, the Court expressly noted that "[t]his might be a different case if it involved a small family partnership, see *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D.N.Y. 1972)."[4]

Petitioners conceded below that SFI has an established institutional identity, the first part of the *Bellis* test, but demonstrated that the District Court erred in applying *Bellis* by completely ignoring the second—and decisive—criterion established by this Court: whether it can fairly be said that the documents sought are held in a representative capacity by the person invoking the privilege. This factor was the determina-

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4 In *Slutsky*, the case cited by the *Bellis* Court, the government sought to compel the production of the business records of the Nevele Country Club for use at the criminal trial of its owners, Ben and Julius Slutsky (the "Slutsky Brothers"). 352 F. Supp. at 1106. The Slutsky Brothers, who operated the multi-million dollar resort as a partnership, claimed that compulsory production of the Nevele records would violate their Fifth Amendment privilege against self-incrimination and sought to quash the subpoena. The government argued that because of the size and scope of the business—a hotel and resort with 325 guest rooms on 1,000 acres of land, a payroll of about $1 million, over $4 million in gross receipts, buildings worth about $4.4 million and a convention sales office in New York City—the records sought were not personal and thus not privileged, and sought to enforce the subpoena. 352 F. Supp. at 1106-07.

The court agreed with the Slutsky Brothers and quashed the subpoena. The court held that while a partnership with significantly more members or a partnership consisting of unrelated members might not enjoy a Fifth Amendment privilege (thus foreshadowing the decision in *Bellis* 17 months later), a "small family partnership" such as the Nevele was more akin to a sole proprietorship than to a corporation and thus could not be compelled to produce its records. 352 F. Supp. at 1108. As demonstrated herein, the facts of this case are strikingly similar to those in *Slutsky* and militate in favor of a similar result.

tive one in *Bellis*, as it is likely to be as to all business partnerships, since they will invariably have an "established institutional identity." In other words, the existence of an established institutional identity is a necessary, but not a sufficient, condition to render the privilege inapplicable to partnership documents; in addition, it must be fair to say under the particular circumstances that the documents are held in a representative capacity. That is why the *Bellis* Court recognized that a small family partnership might present a different case warranting a different result and cited *Slutsky*: in a small family partnership, the personal relationship between the partners and their joint personal relationship to the enterprise may be such that it is not fair to say that the firm's documents are held in a representative, rather than a personal, capacity.

The Court of Appeals merely compounded the District Court's misapplication of *Bellis*. Thus, in its summary order, the Court of Appeals did not even address the District Court's failure to determine—as required by *Bellis*—whether the subpoenaed documents were held by Mr. Senft in a representative capacity. Moreover, in conclusorily holding that Mr. Senft "controlled the records in his representative capacity as a general partner of [SFI]," without undertaking the careful factual analysis required by *Bellis*, the Court of Appeals failed to correct the District Court's error.

The errors committed by the courts below are even more apparent when the record facts are examined with respect to whether the subpoenaed SFI documents are held by Mr. Senft in a representative capacity for the limited partners. Petitioners submit that the facts with respect to SFI's creation as a limited partnership and the practical realities of SFI's ownership and control require the conclusion that SFI is Mr. Senft's personal business. The limited partners of SFI—Mr. Senft's daughter and younger brother—do not share control of the firm and have no real financial investment of their own in the firm (the money for their capital contributions was given to them by Mr. Senft). In short, this is not the typical business partnership,

i.e., a vehicle for two or more persons to manage and control their joint business enterprise or for a person to induce unrelated investors to make capital investments with limited liability in his business. Indeed, the documents here are even more personal and less representative in nature than in *Slutsky*, where the two brother partners shared control of the enterprise and, presumably, the financial investments required by it. In this case, SFI is truly the product only of Mr. Senft's entrepreneurial efforts and financial investments; the limited interest in SFI of his daughter and brother are simply gifts from Mr. Senft of small shares of his firm's profits.

Under the circumstances of this case, SFI's documents are in every realistic sense the property of Mr. Senft, and are not held by him in a representative capacity. To remove the Fifth Amendment privilege from what are, for all practical purposes, sole proprietorship documents because the firm's principal gave gifts of small limited partnership interests in the firm to two close relatives, would indeed ignore this Court's admonition in *Bellis* that "the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise." 417 U.S. at 101. Under *Bellis*, the business records of SFI are not held in a representative capacity; Mr. Senft's Fifth Amendment privilege should apply to the documents sought by the grand jury subpoena here.

Conclusion

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: December 30, 1982

Respectfully submitted,

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